International Total Services, Inc. *and* Allen A. Moss. Case 22–CA–17311

May 20, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

Upon a charge filed by Allen A. Moss, an individual, on October 18, 1990, and an amended charge filed on November 8, 1990, the General Counsel of the National Labor Relations Board issued a complaint on November 30, 1990, against International Total Services, Inc., the Respondent, alleging that it has violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act. Although properly served copies of the charge, the amended charge, and complaint, the Respondent has failed to file a timely answer.

On January 25, 1991, the General Counsel filed a Motion for Summary Judgment, with exhibits attached. On January 30, 1991, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed an untimely response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The complaint states that unless an answer is filed within 14 days of service, ''all of the allegations in the complaint shall be deemed to be admitted to be true and shall be so found by the Board.'' Further, the undisputed allegations in the Motion for Summary Judgment disclose that the complaint specified that an answer was to be filed by December 14, 1990. The Respondent did not file an answer, nor did it request an extension of time to file. By letter dated December 27, 1990, however, the Respondent was given an extension of time until January 3, 1991, to file its answer and was notified that failure to file an answer by the close of business on that date would result in the filing of a Motion for Default Judgment. Again, no answer was filed. On January 4, 1991, the Respondent's counsel was notified by telephone that its answer had not been received. She conceded that she had received the December 27, 1990 letter and indicated that an answer would be filed that day. During that telephone conversation, the Respondent was given a second extension of time until close of business January 9, 1991, to file an answer. The Respondent did not file an answer.

On February 20, 1991, the Respondent filed with the Board a motion for leave to file answer out of rule contending that its failure to file a timely answer was due to the Respondent's failure to receive the complaint until after the expiration of the time period for filing its response due to a relocation of its corporate headquarters,[1] that there exists a genuine dispute with regard to the complaint, and that the denial of a hearing on the matter will result in a substantial inequity. On February 20, 1991, the Respondent also filed a motion in opposition to the General Counsel's Motion for Summary Judgment asserting, inter alia, that the Respondent believed the charges had been withdrawn in December.

On March 11, 1991, the General Counsel filed a reply to the Respondent's motions contending that the complaint was duly served on the Respondent, that there was sufficient opportunity for it to submit a timely answer, and that the Respondent has failed to establish a sufficient reason for its failure to file a timely response to the Board's Order to Show Cause.

As indicated above, it is undisputed that the General Counsel granted to the Respondent an extension of time to file a timely answer on two separate occasions. Further, during a telephone conversation between the General Counsel and the Respondent's counsel she conceded that the December 27, 1990 letter was received. The letter explicitly stated that ''if an Answer is not received by the close of business'' on January 3, 1991, ''a Motion for Default Judgment will be filed.'' The Respondent has not offered a sufficient explanation for its failure to act until about 6 weeks after the second extended deadline for filing a timely answer. Therefore, we deny the Respondent's motion for leave to file an answer out of rule.

We reject the Respondent's motion in opposition as a response to the Notice to Show Cause because it is both untimely filed and lacking in merit. The response was due on February 13 but was not received until February 20. The Respondent's contention that it thought the charge had been withdrawn in December does not excuse its failure to file a timely response to a notice that clearly shows the existence of any agency proceeding on the charge.[2] Nor does the contention have merit as a reason for denying the General Counsel's Motion for Summary Judgment. The General Counsel's letter to the Respondent dated December 27 and his telephone conversation with the Respondent's counsel on January 4 made it clear that the charge had

[1] According to the certified mail receipt, the Respondent received the complaint on December 5, 1990.

[2] Neither is that failure adequately explained by the Respondent's claim that the complaint and notice of hearing was not received until after the time for filing an answer, a claim that in any event is belied by the signed receipt acknowledging service of the complaint. See fn. 1, supra.

not been withdrawn and that the Respondent continued to have an obligation to answer the complaint.

Accordingly, we find that ''good cause'' does not exist for excusing the late filing of the answer. In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, the Respondent, a corporation, with a place of business in Newark, New Jersey, has been engaged in providing skycap services to various airline companies including Continental Airlines. During the 12 months preceding issuance of the complaint, the Respondent in the course and conduct of its operations provided services valued in excess of $50,000 for Continental Airlines, an enterprise within the State of New Jersey, which is directly engaged in interstate commerce. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We also find that the Skycap Review Board is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

About October 15, 1990, the Respondent discharged Allen A. Moss, its employee. The Respondent engaged in such conduct against Moss because he joined, supported, or assisted the Union, and engaged in concerted activities for the purpose of collective bargaining or other mutual aid and protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection. We find that the Respondent's discharge of Moss violated Section 8(a)(3) and (1) of the Act.

Since about November 8, 1990, the Respondent has refused to reinstate employee Moss to his former position of employment. The Respondent has engaged in such conduct against Moss because he filed charges and gave testimony under the Act. We find that the Respondent's refusal to reinstate Moss violated Section 8(a)(4) and (1) of the Act.

CONCLUSIONS OF LAW

1. By discharging Allen A. Moss because he joined, supported, or assisted the Union and engaged in concerted activity for the purposes of collective bargaining or other mutual aid or protection, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

2. By refusing to reinstate Moss to his former position of employment because he filed charges and gave testimony under the Act, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(4) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully discharged employee Allen A. Moss, we shall order the Respondent to offer him immediate and full reinstatement to his former position or, if this position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings he may have suffered as a result of the Respondent's unlawful conduct. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall also order the Respondent to remove from its files any reference to the unlawful discrimination against Moss and notify Moss in writing that this has been done and that the unlawful discrimination will not be used against him in any way.

ORDER

The National Labor Relations Board orders that the Respondent, International Total Services, Inc., Newark, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they engaged in union or concerted activities.

(b) Refusing to reinstate employees to their former positions of employment because they filed charges and gave testimony under the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Allen A. Moss immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discrimination against Allen A. Moss and notify him in writing that this has been done and that this unlawful action will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payrolls records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Newark, New Jersey, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against any of you because of your union or concerted activities.

WE WILL NOT refuse to reinstate you to your former positions of employment because you file charges or give testimony under the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Allen A. Moss immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings he may have suffered as a result of our discrimination against him, with interest.

WE WILL remove from our files any reference to the unlawful discrimination against Allen A. Moss and notify him in writing that this has been done and that our unlawful action will not be used against him in any way.

INTERNATIONAL TOTAL SERVICES, INC.